

ARTICLE 32 PRETRIAL INVESTIGATION INVESTIGATING OFFICER'S GUIDE

1-1 Purpose and Scope.

This guide is for use by officers who have been appointed as investigating officers under Article 32(b) of the Uniform Code of Military Justice. The guide should be used in conjunction with the Investigating Officer's Report (DD Form 457) and the applicable Rules for Courts-Martial (R.C.M.) in the Manual for Courts-Martial, 1984 (MCM, 1984).

The investigating officer's function is:

- a. To make a thorough and impartial investigation into the truth of the allegations;
- b. To consider the correctness and appropriateness of the charges, both as to the form and substance of the charges; and
- c. To make recommendations as to the disposition of the charges in the interest of justice and discipline.

1-2 General instructions

a. Duties of Investigating Officer. The assignment of an officer as an Article 32(b) investigating officer takes priority over other duties. As an officer detailed to conduct an investigation you will be performing a judicial function. In preparation for examination of the case, you should become thoroughly familiar with the contents of this guide, R.C.M. 405, MCM, 1984 and Article 32, UCMJ. Your legal responsibilities are:

1. Thoroughly investigate the conduct and circumstances underlying all charge(s) and specification(s) alleged in the charge sheet(s);
2. Complete the investigation impartially; and
3. Make all appropriate recommendations as to charges and disposition.

b. Legal advice for the investigating officer. Upon your appointment you may have occasion to seek legal advice. It is imperative that the advice come from a judge advocate who has no direct interest in the outcome of the proceedings. Conclusions to be drawn from the evidence in the case and recommendations for disposition are matters solely within your judgment. The law requires these matters be determined by you in your own,

independent, unfettered judgment. You must avoid inquiries or discussions with other officers which might be perceived as overriding your own independent judgment in the case. As a general rule, you should keep a record of the dates of consultation with any legal advisor and the matters discussed.

d. Legal Counsel for the accused. The accused may be represented during the investigation by civilian counsel at no expense to the United States, by military counsel of the accused's selection if such counsel is reasonably available, and/or military counsel detailed for the investigation. The taking of evidence will be conducted in the presence of counsel.

e. Legal Counsel for the Government. Counsel for the United States may be detailed by the appointing authority. Government counsel is not the legal advisor for the investigating officer, but instead represents the United States in the investigation.

h. Legal Advisor for the Investigation. The Article 32 Appointing Authority may detail a disinterested judge advocate as the investigating officer's legal advisor. If one is detailed, he is available to discuss legal issues concerning the investigation which might arise. He advises only, for your convenience, on technical legal matters which otherwise might confuse or delay the investigation. You must remember at all times that the investigation is your responsibility only, and not allow the legal adviser's advice to ever override your own notions and judgment concerning the conduct and results of the investigation.

g. Administrative Support. Administrative support will be provided by the Military Justice section of the Office of the Staff Judge Advocate.

2-1 General considerations

The Article 32 investigation is a judicial proceeding and plays a necessary role in military due process. The investigation is subject to judicial review if there is a trial. The ultimate outcome of the case may depend on your proper performance of your investigation duties.

The accused as well as the United States has a right to a speedy disposition of any charges preferred against him; therefore, it is necessary to conduct the investigation as expeditiously as possible, consistent with thoroughness. However, any reasonable request by the accused for short periods of delay should be carefully considered. Requests for delay by the accused should normally be in writing and attached to the report of the investigation.

2-2 Sequence of preparation

a. After receipt of the appointing letter, you should read Article 32, UCMJ, R.C.M. 405, and this guide.

b. Examine the charge sheet and any accompanying papers.

c. Determine whether there is any reason which would prevent you from conducting a fair and impartial investigation.

d. Determine the applicable law.

(1) You should be familiar with the elements (essential facts) of the offense(s) charged. You should read the discussion of the offense(s) in the MCM, 1984.

(2) You should insure that each specification alleges an offense (consult the sample specification in the MCM) and that each offense charged is a violation of the proper Article of the UCMJ.

e. Arrange place and time for investigation. You should coordinate with the government counsel to secure a time and place for conducting the investigation and so notify the appropriate parties.

3-1 Conduct of the formal Investigation

Appendix A sets forth the suggested procedures for the investigation. These procedures may be varied at your discretion.

3-2 Procedures for taking testimony

a. Witnesses. Prospective witnesses in the case should not normally be permitted to hear the testimony of other witnesses. Witnesses ordinarily should remain outside the hearing room when not actually testifying. Exceptions to this rule may be granted within your discretion. Witnesses should be instructed not to discuss their testimony with other witnesses, and Appendix A contains a sample advisement to witnesses you may choose to use. The testimony of all witnesses shall be taken under oath, except that the accused may make an unsworn statement if he so desires. Government counsel shall administer the appropriate oath to all witnesses. A sample procedure for the examination of witnesses is set forth in Appendix A. If during the investigation any witness subject to the UCMJ is suspected of an offense under the code, the investigating officer should immediately comply with the warning requirements set forth in Article 31 of the UCMJ. Civilian witnesses suspected of a criminal offense should be warned as required by the Fifth Amendment to the U.S. Constitution, if appropriate. Government Counsel or the legal advisor are available for assistance in providing the proper warning if you desire. The investigating officer should inquire to determine if potential witnesses will be available for trial. If it appears that a material witness may not be available for trial the investigating officer should notify the commander who directed the investigation and note the fact in the report of investigation.

b. Availability of defense witnesses. You must carefully consider defense requests for production of witnesses to testify at the pretrial investigation. The typical issue for your decision is the "availability" or unavailability of witnesses not located at the hearing site. Ordinarily, the defense seeks to call witnesses to support its defense or to cross-examine a potential prosecution witness. A witness whose testimony is relevant to the investigation and not unreasonably cumulative should normally be produced if reasonably available. The determination of reasonable availability requires balancing the significance of the witness' expected testimony against other factors, including the difficulty of obtaining the witness' presence and the effect on military operations of doing so. If you find the witness relevant but not reasonably available, you should consider alternative forms of receiving the testimony, such as statements, stipulations, etc. If you determine that the witness should be produced by the government, your decision may be overruled by the Art. 32 appointing authority.

c. Refusal to testify. If a witness who is a member of the military refuses to testify and it does not appear that the statement is incriminating or otherwise privileged, allow the witness the opportunity to consult with a judge advocate concerning his situation and the duty to testify. If the witness persists in refusing to testify you may give an order to do so. Failure to comply with the order could result in disciplinary action. If the witness persists in the refusal to testify, you may consider the witness to be unavailable and consider any prior sworn statement. Once again, this is an appropriate area for seeking legal advice from the legal advisor.

d. Inquiry into mental responsibility or capacity. If in your opinion grounds exist for inquiring into the mental condition of the accused, that is, to determine whether the accused was mentally responsible at the time of the acts charged or has sufficient mental capacity to understand the nature of the investigation and to cooperate intelligently in his defense, you should notify the officer who directed the investigation who will take appropriate action.

e. Defense objections. If defense counsel object to any of the procedures or otherwise objects to alleged defects in the investigation, you are not required to rule on the objection. You may, however, take corrective action in response to an objection if you believe such action is appropriate. You may require a party to file any objection in writing. You should note a party's objection in your report (item 15) if requested to do so, (See R.C.M. 405(h)(2)) and must insure that it is properly reflected in the transcript of the investigation.

f. Closing the investigation. After you receive all the evidence and the accused and counsel have indicated that they have no further evidence to offer, and you do not contemplate calling any more witnesses or receiving other evidence, you should so inform the accused. The accused or counsel should be afforded the opportunity to make a statement of what they consider an appropriate recommendation concerning the disposition of the charges in the case. You should consider any comments made in that connection in deciding what disposition you will recommend to the officer who directed the investigation. You should then declare the investigation closed.

4-1 General considerations for completing the report

During the investigation you should have before you a copy of DD Form 457, Investigating Officer's Report. The form and other notes may be used as working papers in preparing the report to the officer who directed the investigation.

4-2 Considering the evidence and making a recommendation

The testimony will be transcribed and you will have an opportunity to review it before coming to a conclusion. Record your recommendation in Item 20 or 21 of the working copy of the Investigating Officer's Report, and then have the report typed in final form. Your recommendation may include making changes to the charges and specifications, deleting or adding charges and specifications, or any other modification that you believe the evidence warrants. You must also make a recommendation concerning the appropriate forum to dispose of the charges recommended, general, special, summary courts-martial, nonjudicial punishment, or no disciplinary action at all. This recommendation should be based on your judgment as to the relative seriousness of the offense, the needs of the service, the interests of discipline and morale, the circumstances of the accused, as well as the welfare of society.

4-3 Forwarding the report

The report together with all evidence produced at the investigation should be forwarded to the officer who directed the investigation. The formal report is made by completing the form and attaching the following exhibits:

- a. Appointing letter;
- b. Charge sheet;
- c. Transcript of witnesses examined;
- d. Statements or documentary evidence;
- e. Description or Photograph of real evidence; and
- f. Any statements, documentary evidence or real evidence received but not considered by the investigation officer.

The investigating officer will indicate during the hearing that the appointing letter will be marked as investigative exhibit one

(IE 1) and the charge sheet as investigative exhibit two (IE 2). Other exhibits will be marked in order as offered starting with investigative exhibit three. The reporter detailed for the investigation will mark the exhibits.

The officer directing the investigation will furnish a copy of the report to the accused.

PROCEDURE FOR FORMAL INVESTIGATION

IO: ARE COUNSEL READY TO PROCEED?

GC/DC: YES, SIR.

IO: THE INVESTIGATION WILL COME TO ORDER.

IO: THIS INVESTIGATION IS CONVENED BY ORDER OF THE COMMANDING OFFICER, _____ BY HIS APPOINTING ORDER DATED _____. COPIES OF THE APPOINTING ORDER HAVE BEEN FURNISHED TO THE INVESTIGATING OFFICER, GOVERNMENT COUNSEL, COUNSEL FOR THE ACCUSED, AND THE ACCUSED. A COPY OF THE APPOINTING ORDER WILL BE INSERTED IN THE RECORD AS EXHIBIT #1 FOR THE INVESTIGATION. (NOTE ANY MODIFICATIONS)

THE FOLLOWING NAMED PARTIES ARE PRESENT:

IO: _____
GC: _____
DC: _____
ACC: _____

IO: I HAVE NO KNOWLEDGE OF ANY GROUND FOR MY DISQUALIFICATION FROM ACTING AS INVESTIGATING OFFICER. DOES EITHER SIDE DESIRE TO QUESTION ME OR RAISE ANY CHALLENGE AT THIS TIME?

IO: (REPORTER) _____ HAS BEEN APPOINTED REPORTER FOR THIS INVESTIGATION AND HAS BEEN PREVIOUSLY SWORN.

IO: WOULD COUNSEL FOR THE GOVERNMENT STATE HIS QUALIFICATIONS.

GC: I (NAME) AM A LAWYER CERTIFIED IN ACCORDANCE WITH ARTICLE 27(B) OF THE UNIFORM CODE OF MILITARY JUSTICE.

IO: BY WHOM WILL THE ACCUSED BE REPRESENTED?

DC: I (NAME) AM A LAWYER CERTIFIED IN ACCORDANCE WITH ARTICLE 27(B) OF THE UCMJ.

IO: (ACC) I HAVE BEEN APPOINTED TO CONDUCT A FORMAL PRETRIAL INVESTIGATION TO INQUIRE INTO THE TRUTH OF THE MATTERS SET FORTH IN THE CHARGE SHEET, THE FORM OF THE CHARGE(S) AND TO SECURE INFORMATION UPON WHICH TO DETERMINE WHAT DISPOSITION SHOULD BE MADE OF THIS CASE. I AM ABOUT TO INVESTIGATE (THIS) (THESE) CHARGE(S): HOWEVER THIS IS NOT A TRIAL. I AM NOT HERE TO DETERMINE YOUR INNOCENCE OR GUILT. I SEEK ONLY TO DETERMINE ALL THE FACTS SURROUNDING THE OFFENSE(S) OR MISCONDUCT ALLEGED. I WILL PURSUE EQUALLY AND IMPARTIALLY ALL MATTERS WHICH TEND TO EXONERATE YOU AND ALL MATTERS WHICH TEND TO IMPLICATE YOU. YOU HAVE THE RIGHT TO BE PRESENT DURING THE PRESENTATION OF ALL EVIDENCE.

APPENDIX A

IO: (GC) , HAS BEEN APPOINTED AS COUNSEL FOR THE GOVERNMENT AT THIS INVESTIGATION. HE IS NOT ACTING AS COUNSEL FOR THE INVESTIGATING OFFICER AND IS HERE SOLELY TO REPRESENT THE UNITED STATES. HE WILL NOT ADVISE ME AS TO WHAT DISPOSITION I WILL RECOMMEND IN THIS CASE, AS THAT DECISION RESTS WITH ME ALONE. AFTER COMPLETING THIS INVESTIGATION I SHALL MAKE THOSE RECOMMENDATIONS WHICH I DEEM APPROPRIATE CONCERNING THE DISPOSITION OF MATTERS DISCLOSED AT THIS PROCEEDING. ARE THERE ANY QUESTIONS BY EITHER SIDE OR BY THE ACCUSED CONCERNING MY FUNCTION AT THIS INVESTIGATION.

GC/DC: (RESPONSE)

IO: THE NATURE OF THE CHARGE(S) ARE _____
IN VIOLATION OF ARTICLE _____, UCMJ
_____ IN VIOLATION OF ARTICLE _____, UCMJ
_____ IN VIOLATION OF ARTICLE _____, UCMJ
_____ IN VIOLATION OF ARTICLE _____, UCMJ

IO: (ACC) , HAVE YOU EXAMINED THE CHARGE SHEET?

ACC: (RESPONSE)

IO: WOULD THE GOVERNMENT COUNSEL READ THE NAMES AND UNITS OF THE WITNESSES AGAINST THE ACCUSED, SO FAR AS IS KNOWN TO HIM AT THIS TIME:

IO: A COPY OF THE CHARGE SHEET WILL BE APPENDED TO THE RECORD AS EXHIBIT # 2 FOR THE INVESTIGATION. DOES COUNSEL FOR THE ACCUSED DESIRE THAT I READ THE CHARGE(S) OR DESIRE FURTHER EXAMINATION OF THE CHARGE SHEET BEFORE WE CONTINUE?

DC: (RESPONSE)

IO. IS THE COUNSEL FOR THE ACCUSED, IN ALL RESPECTS READY TO PROCEED WITH THE INVESTIGATION?

DC: (RESPONSE)

IO: (ACCUSED) , I WILL NOW READ ARTICLE 31 OF THE UCMJ TO YOU UNLESS YOUR COUNSEL EXPRESSES YOUR DESIRE TO WAIVE THIS ADVICE.

DC: (RESPONSE)

APPENDIX A

IO: YOU ARE ADVISED THAT THE PROVISIONS OF ARTICLE 31 UCMJ, ARE AS FOLLOWS:

(A) NO ONE SHALL COMPEL YOU TO INCRIMINATE YOURSELF OR TO ANSWER ANY QUESTIONS THE ANSWER TO WHICH MAY TEND TO INCRIMINATE YOU.

(B) NO ONE SHALL INTERROGATE OR REQUEST ANY STATEMENT FROM YOU WITHOUT FIRST INFORMING YOU OF THE NATURE OF THE ACCUSATION, AND ADVISING YOU THAT YOU DO NOT HAVE TO MAKE ANY STATEMENT REGARDING THE OFFENSE OF WHICH YOU ARE ACCUSED OR SUSPECTED, AND THAT ANY STATEMENT MADE BY YOU MAY BE USED AS EVIDENCE AGAINST YOU IN A TRIAL BY COURT-MARTIAL.

(C) NO ONE SHALL COMPEL YOU TO MAKE A STATEMENT OR TO PRODUCE EVIDENCE BEFORE ANY MILITARY TRIBUNAL, IF THE STATEMENT OR EVIDENCE IS NOT MATERIAL TO THE ISSUE AND MAY TEND TO DEGRADE YOU.

(D) NO STATEMENT OBTAINED FROM YOU IN VIOLATION OF THIS ARTICLE THROUGH THE USE OF COERCION, UNLAWFUL INFLUENCE, OR UNLAWFUL INDUCEMENT SHALL BE RECEIVED IN EVIDENCE AGAINST YOU IN A TRIAL BY COURT-MARTIAL.

IO: (ACCUSED) , I NOTE THAT (DC) HAS BEEN APPOINTED AS YOUR LAWYER COUNSEL AND THAT HE IS CERTIFIED IN ACCORDANCE WITH -ARTICLE 27(B), UCMJ. YOU HAVE THE RIGHT TO BE REPRESENTED INSTEAD BY THE MILITARY LAWYER OF YOUR CHOICE AT NO EXPENSE TO YOU, IF HE IS REASONABLY AVAILABLE. IF YOU REQUEST A MILITARY LAWYER OF YOUR OWN SELECTION AND THAT LAWYER IS REASONABLY AVAILABLE TO REPRESENT YOU THEN YOUR DETAILED DEFENSE COUNSEL WILL NORMALLY BE EXCUSED FROM ANY FURTHER PARTICIPATION IN YOUR CASE. HOWEVER, YOU MAY REQUEST THAT YOUR DETAILED DEFENSE COUNSEL CONTINUE TO ACT AS ASSOCIATE COUNSEL WITH THE MILITARY COUNSEL YOU SELECT, AND THE CONVENING AUTHORITY MAY APPROVE SUCH A REQUEST. IN ADDITION, YOU MAY BE REPRESENTED BY A CIVILIAN LAWYER OF YOUR OWN CHOICE, AT NO EXPENSE TO THE GOVERNMENT. WHO DO YOU DESIRE TO REPRESENT YOU?

ACC: (RESPONSE)

IO: I WILL NOW ADVISE YOU THAT IN ADDITION TO THE RIGHTS PREVIOUSLY MENTIONED, YOU HAVE THE FOLLOWING RIGHTS:

- A. TO CROSS-EXAMINE ALL AVAILABLE WITNESSES AGAINST YOU.
- B. TO EXAMINE ALL EVIDENCE PRESENTED BY THE GOVERNMENT.
- C. TO PRESENT ANYTHING YOU MAY DESIRE IN YOUR OWN BEHALF, EITHER IN DEFENSE, EXTENUATION, OR MITIGATION.
- D. TO HAVE THE INVESTIGATING OFFICER, EXAMINE ANY AVAILABLE WITNESSES YOU MAY REQUEST.

APPENDIX A

E. TO MAKE A STATEMENT IN ANY FORM, WRITTEN OR ORAL, SWORN OR UNSWORN.

F. TO REMAIN SILENT OR TO REFUSE TO MAKE ANY STATEMENT REGARDING ANY OFFENSES OF WHICH YOU MAY BE ACCUSED OR CONCERNING WHICH YOU MAY BE INVESTIGATED.

G. YOU ARE FURTHER ADVISED THAT ANY STATEMENT MADE BY YOU, MAY BE USED AS EVIDENCE AGAINST YOU IN A TRIAL BY COURT-MARTIAL OR OTHER LEGAL PROCEEDING.

IO: DO YOU UNDERSTAND YOUR RIGHTS IN THE INVESTIGATION?

ACC: (RESPONSE)

IO: I REMIND COUNSEL TO THESE PROCEEDINGS THAT THEY MAY MAKE OBJECTIONS TO THE EVIDENCE PRESENTED HERE. WE ARE NOT, HOWEVER, BOUND BY THE RULES OF EVIDENCE APPLICABLE TO COURT-MARTIAL. I WILL BE THE SOLE JUDGE OF WHAT EVIDENCE SHALL BE ADMITTED AND CONSIDERED BY ME. GENERALLY, YOUR OBJECTION WILL BE NOTED FOR THE RECORD, HOWEVER, I MAY RULE ON SPECIFIC OBJECTIONS.

IO: COUNSEL FOR THE GOVERNMENT, YOU MAY PROCEED.

GC: COUNSEL FOR THE GOVERNMENT CALLS _____
AS A WITNESS.

OATH FOR WITNESSES:

GC: DO YOU (SWEAR)(AFFIRM) THAT THE EVIDENCE YOU GIVE SHALL BE THE TRUTH, THE WHOLE TRUTH, AND NOTHING BUT THE TRUTH?

GC: STATE YOUR NAME AND RANK AND SPELL YOUR LAST NAME FOR THE RECORD.

(CIVILIAN - OCCUPATION AND HIS/HER ADDRESS)

GC: WHAT IS YOUR CURRENT UNIT AND ORGANIZATION.

GC: (QUESTIONS WITNESS).

DC: (QUESTIONS WITNESS).

IO: DO COUNSEL DESIRE THIS WITNESS BE WARNED?

GC/DC: (RESPONSE)

WITNESS WARNING

YOU ARE INSTRUCTED NOT TO DISCUSS YOUR TESTIMONY IN THIS INVESTIGATION WITH ANYONE EXCEPT COUNSEL IN THIS CASE. YOU WILL NOT ALLOW ANY WITNESS IN THIS INVESTIGATION TO TALK TO YOU ABOUT THE TESTIMONY HE HAS GIVEN OR WHICH HE INTENDS TO GIVE. IF ANYONE OTHER THAN COUNSEL ATTEMPTS TO TALK TO YOU ABOUT YOUR TESTIMONY IN THIS INVESTIGATION, YOU SHOULD MAKE THE CIRCUMSTANCES KNOWN TO THE GOVERNMENT COUNSEL.

GC: THE GOVERNMENT HAS NOTHING MORE TO PRESENT.

APPENDIX A

IO: I INTEND TO EXAMINE THE (SRB) (OQR) OF THE ACCUSED.

IO: DOES THE ACCUSED DESIRE TO PRESENT ANY EVIDENCE, EITHER ON THE MERITS, IN HIS DEFENSE, OR IN EXTENUATION OR MITIGATION?

DC: (RESPONSE)

IO. DOES THE ACCUSED DESIRE TO HAVE THE INVESTIGATING OFFICER EXAMINE ANY WITNESSES REQUESTED BY THE ACCUSED?

DC: (RESPONSE)

IO: DOES THE ACCUSED DESIRE TO MAKE A STATEMENT, IN ANY FORM, EITHER UNDER OATH WHICH WOULD BE SUBJECT TO CROSS EXAMINATION, OR AN UNSWORN STATEMENT UPON WHICH HE COULD NOT BE CROSS EXAMINED?

DC: (RESPONSE)

IO: WOULD EITHER COUNSEL CARE TO ARGUE AS TO THE SUFFICIENCY OF THE EVIDENCE, THE FORM OF THE CHARGE(S), AND THE DISPOSITION OF THE CHARGE(S)?

GC/DC: (RESPONSE)

IO: UNLESS COUNSEL FOR THE GOVERNMENT OR THE ACCUSED HAS ANYTHING FURTHER TO OFFER, THE INVESTIGATION WILL BE CLOSED.

APPENDIX A